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SYARIKAT SINISAN SDN BHD

v.

THE DIRECTOR OF LANDS & SURVEYS, SABAH & ORS

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HIGH COURT SABAH & SARAWAK, SANDAKAN
LINTON ALBERT J
[SUIT NO: S22-08-1999]
26 APRIL 2006

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LAND LAW: *Alienation and incidents - Validity - Consent order to alienate State land - Director of Lands and Surveys entering into consent order to alienate replacement land to applicant - Whether contravened s. 9 Sabah Land Ordinance (Cap 68) - Whether an illegality - Whether null and void ex debito justitiae*

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The plaintiff had applied for, and was offered a parcel of State land by the 1st defendant. Notwithstanding the offer, and the fact that the requisite premiums and survey fees thereof had been paid by the plaintiff, the land was alienated to other land applicants. Aggrieved, the plaintiff commenced proceedings against the 1st defendant and also the

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3rd defendant (the State Government of Sabah). Thereupon, in an effort apparently to settle the matter, the 1st defendant entered into a consent order whereby it agreed to alienate a replacement land to the plaintiff ('consent order'). Subsequently, however, the 1st and 3rd defendants contended that the consent order was in violation of s. 9 of the Sabah Land Ordinance (Cap 68), and in the circumstances applied to have it

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set aside. The plaintiff opposed the application and, while questioning the procedure adopted by the defendants, complained about the delay of 14 months in making this application. The plaintiff further contended that the 3rd defendant ought to give efficacy to the consent order, bearing in mind the decision in *Yee Seng Plantations Sdn Bhd v. Kerajaan Negeri*

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Terengganu & Ors. The issue was whether the consent order was in law tainted with illegality, and was hence null and void *ex debito justitiae*.

Held (allowing the defendants' application to set aside):

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(1) It is patently clear that the consent order commands the 1st defendant to alienate land to the plaintiff in replace of the land initially applied for by the plaintiff which had since been lawfully acquired by the 2nd defendant in complete disregard of the statutory requirement that the 1st defendant may alienate State Land "subject to any general or special direction of the Cabinet". Simply put,

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cl. 1 of the consent order contravenes s. 9 of the Sabah Land Ordinance and by necessary implication, so is cl. 2 which is consequential upon cl. 1. (para 4)

(2) The attempt by the plaintiff to enlist the 3rd defendant to give efficacy to the consent order is misplaced because the 3rd defendant is not a party to the consent order and it is therefore unnecessary to consider whether the word "Cabinet" referred to in s. 9 of the Sabah Land Ordinance is subsumed under the 3rd defendant. Likewise, since the 3rd defendant is not a party to the consent order, the reasoning in *Yee Seng Plantations* cannot be of assistance to the plaintiff because there is no parallel provision in the Sabah Land Ordinance to impute the word "Cabinet" into the consent order. Consequently, the consent order contravenes s. 9 of the Sabah Land Ordinance (Cap 68) and ought to be set aside *ex debito justitiae*. (para 4)

(3) There is nothing to suggest that the plaintiff, as a result of the alleged procedural flaw and delay, has thereby suffered any prejudice or injustice in any of their multifarious forms. It is apt, therefore, in these circumstances, to apply the general principle that mere technicalities should not be allowed to obstruct the process of dispensing justice to the deserving party. (para 5)

[Application allowed with costs to plaintiff to be paid by 1st defendant]

Case(s) referred to:

Badiaddin Mohd Mahidin & Anor v. Arab Malaysia Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Beauford Baru Sdn Bhd v. Gopala Krishnan VK Gopalan [2002] 3 CLJ 686 HC ***(refd)***

Yee Seng Plantations Sdn Bhd v. Kerajaan Negeri Terengganu & Ors [2000] 3 CLJ 666 CA ***(dist)***

Legislation referred to:

Malay Reservations Enactment 1933, s. 13
National Land Code, s. 16(2)
Sabah Land Ordinance (Cap 68), s. 9

For the plaintiff - Hjh Shakinur Ain Hj Karama; M/s Peter Lo & Co
For the defendants - Mohd Hanafiah Mohd Kassim; State AG's Chambers

Reported by Rose Aziz

JUDGMENT

Linton Albert J:

[1] This is an application to set aside a consent order dated 13 May 2004. The events that led to the consent order were these. The plaintiff had applied for state land and on 14 July 1995 an offer to alienate land to the plaintiff was made by the 1st defendant. The requisite premiums

A and survey fees pursuant to the offer to alienate land were duly paid by the plaintiff to the relevant authorities. Unfortunately for the plaintiff, the same parcel of land was subsequently approved for alienation to other land applicants. Consequently the plaintiff commenced proceedings against the 1st and 3rd defendants under originating summons dated
B 19 June 1998 and this was ordered to be converted into a writ on 22 February 1999. The 2nd defendant acquired his interest in the disputed land from the rival group of applicants and obtained the relevant title deeds in 2004 which apparently prompted the plaintiff and the 1st defendant to fall back on a letter dated 21 May 2002 from the
C 1st defendant to the assistant collector of Land Revenue, Beluran, a copy whereof was addressed to the plaintiff. The letter stated that the Department of Lands and Surveys agreed in principle with the proposal for replacement of the land applied for by the plaintiff which it had proposed. The letter went on to state that it was the policy of the department that the replacement land must be applied for in accordance
D with the usual process and assessed by the Land Utilisation Committee for approval and endorsement. The letter concluded by asking the Assistant Collector of Land Revenue to advise the plaintiff to take follow-up action on the matters relating to the new area for the replacement land. The full terms of the consent order are now
E reproduced:

> 1. The 1st defendant shall replace the land applied for by the plaintiff under P.T. No. 89082315 with another piece of land (hereinafter referred to as "the replacement land").
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> 2. The 1st defendant shall proceed to issue draft title under CL. No. 085336849 (RSP 2003089004-40) and thereafter shall cause the Registrar of Title to register the title to the replacement land within 6 months from the date hereof.
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> 3. The 1st defendant shall pay cost to be taxed, unless agreed, to the plaintiff.

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[2] The basis of the application is the contention that the consent order is tainted with illegality and is accordingly null and void *ex debito justitiae*. The other grounds revolve around this contention and matters prior to and after the consent order.

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[3] Learned State Legal Officer, Encik Hanafiah Kassim in his written submissions argues that the terms of the consent order contravene the provisions of s. 9 of the Sabah Land Ordinance (Cap 68) which reads:

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> Subject to any general or special direction of the Cabinet the Director may alienate State land on such terms or in such manner as is authorized by the Ordinance and may also impose special conditions in respect thereof to be set out in the title.

[4] It is patently clear that the consent order commands the 1st defendant to alienate land to the plaintiff in replacement of the land initially applied for by the plaintiff which had since been lawfully acquired by the 2nd defendant in complete disregard of the statutory requirement that the 1st defendant may alienate State Land "subject to any general or special direction of the "cabinet". Simply put, cl. 1 of the consent order contravenes s. 9 of the Sabah Land Ordinance and by necessary implication, so is cl. 2 which is consequential upon cl. 1. Learned State Legal Officer relied on *Badiaddin Mohd Mahidin & Anor v. Arab Malaysia Finance Bhd* [1998] 2 CLJ 75 FC where the Federal Court set aside an order of sale *ex debito justitiae* because it was made in contravention of s. 13 of the Malay Reservations Enactment 1933. The attempt by the learned counsel for the plaintiff to enlist the 3rd defendant to give efficacy to the consent order is misplaced because the 3rd defendant is not a party to the consent order and it is therefore unnecessary to consider whether the word "cabinet" referred to in s. 9 of the Sabah Land Ordinance is subsumed under the 3rd defendant, the State Government of Sabah. In *Yee Seng Plantations Sdn Bhd v. Kerajaan Negeri Terengganu & Ors* [2000] 3 CLJ 666 CA the parties in the first action entered into a consent: order whereby the State Authority was to alienate certain lands to the appellants but difficulties arose because the state authority, namely the state executive council of the 1st respondent had rejected the appellants' application for alienation of these lands.

The 1st respondent contended that it was not bound by the terms of the consent order because it was not impleaded as a party to the action in which the consent order was made. The appellants, on the other hand, argued otherwise and relied *inter alia* on s. 16(2) of the National Land Code which reads:

> Any action, suit or other proceeding relating to land in which it is sought to establish any liability on the part of the State Authority shall be brought against the State Director in the name of his office.

Gopal Sri Ram, JCA had this to say at p. 670:

> It is manifestly clear from the plain language of the second subsection to s. 16 that the state authority is to be impleaded in a suit or other proceeding by citing the state director as a party ...

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> It is not in dispute that the second respondent, the state director, was a defendant in the first action. He was the first defendant. The state authority was, therefore, a party to the first action by virtue of s. 16(2) of the Code.

Here, it is not disputed that the 3rd defendant is a party to the action
B and is represented by the learned State Legal Officer but the fact of the matter is that the 3rd defendant is not a party to the consent order. I do not see how the reasoning in *Yee Seng* can be of assistance to the plaintiff because there is no parallel provisions in the Sabah Land Ordinance to impute the word cabinet into the consent order.
C Consequently it contravenes s. 9 of the Sabah Land Ordinance and ought to be set aside *ex debito justitiae.*

[5] I now turn to the plaintiff's argument as to whether the correct procedure was adopted by the 1st and 3rd defendants and the delay of 14 months in making this application. There is, however, nothing
D whatsoever to suggest that the plaintiff has thereby suffered any prejudice or injustice in any of their multifarious forms. It is apt, therefore, in these circumstances, to apply the general principle that mere technicalities should not be allowed to obstruct the process of dispensing justice to the deserving party (see *Beauford Baru Sdn Bhd v. Gopala*
E *Krishnan VK Gopalan* [2002] 3 CLJ 686). The situation the 1st defendant found himself in- that of a hapless litigant perilously stranded in the midst of the consent order by the sheer lack of responsibility, professionalism and outright insubordination which allegedly perrade the State Attorney-General's Chambers clearly explain the delay. The
F efficacy of objections based on technicalities are relics of the past; they cannot deprive a litigant the justice he deserves especially where, as here, no corresponding injustice is thereby caused to the opposite party. This, in my view, is encapsulated in the judgment of Gopal Sri Ram JCA in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysia Finance Bhd*
G *(supra)* at pp 112-113:

> If, as held by that court, there is no power in a court to set aside its order, though made in contravention of the express provisions of a statute, then, I must fold my arms in abject submission, allow the orders to stand and let the illegality persist. But I do not perceive the
H law to intend such a result.
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> I take it to be well settled that even courts of unlimited jurisdiction have no authority to act in contravention of written law. Of course, so long as an order of a court of unlimited jurisdiction stands, irregular though it may be, it must be respected. But where an order of such a
I court is made in breach of statute, it is made without jurisdiction and may therefore be declared void and set aside in proceedings brought

for that purpose. It is then entirely open to the court, upon the illegality being clearly shown, to grant a declaration to the effect that the order is invalid and to have it set aside. It is wrong to assume that such an order may only be corrected on appeal.

For the reasons and in the circumstances aforesaid the application is allowed in terms of prayers 1 and 2 and costs for the plaintiff to be paid by the 1st defendant. Order accordingly.